

No. 3203

United States
Circuit Court of Appeals
For the Ninth Circuit.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

PRESTON ROYER,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Eastern District of Washington, Southern Division.

FILED

SEP 17 1918

F. D. MONCKTON,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

HAYDAN, LANGHORNE & METZGER, 617

Tacoma Building, Tacoma, Washington,

LINN & BOYLE, Prosser, Washington,

Attorneys for Plaintiff and Defendant
in Error,

and

A. C. SPENCER and C. E. COCHRAN, 510 Wells-
Fargo, Building, Portland, Oregon,

RICHARDS & FONTAINE, Yakima, Washing-
ton,

Attorneys for Defendants and Plain-
tiff in Error, [2*]

*In the Superior Court of the State of Washington
for Benton County.*

No. 2403.

PRESTON ROYER,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Complaint.

Comes now the above-named plaintiff, by Hayden,
Langhorne & Metzger, and Linn & Boyle, his attor-
neys, and states to the Court:

*Page-number appearing at foot of page of original certified Transcript
of Record.

1.

That the plaintiff now is, and at all the times hereinafter stated was, the owner in his separate and individual right, of the following described real property situate in Benton County, Washington, to wit: The west one-half of the southeast quarter of the northwest quarter (W. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$) of Section Twenty-eight (28) in township nine (9) north, range twenty-five (25) east, W. M., less the right-of-way of the Northern Pacific Railway Company, a corporation, over and across such tract; and comprising, less such right of way, nineteen (19) acres, more or less, according to the Government Survey thereof.

2.

That now, and during all of the times hereinafter specified, the Oregon-Washington Railroad & Navigation Company was a corporation organized and existing under and in virtue of the Laws of the State of Oregon, at all of such times doing and authorized to do business in the state of Washington, to wit: railway business and was running and operating a line of railway between the [3] City of Yakima County, Washington, and Walla Walla, Walla Walla County, Washington; and its said line of railway extending between the points above mentioned, running through Benton County, Washington, and over and across the south one-half of the north one-half of the northwest quarter (S. $\frac{1}{2}$ of N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$) of Section twenty-eight (28), and the east one-half of the northeast quarter (E. $\frac{1}{2}$ of N. E. $\frac{1}{4}$) of Section twenty-nine (29), both of said Sections being in

township nine (9) north, range twenty-five (25) E. W. M.; the right of way of said company over and across the above described lands being one hundred feet in width.

3.

That a certain creek or water course known as "Spring Creek" has its source at the top of the Rattlesnake Hills in Benton County, Washington, and running in a general southeasterly direction for a distance of some eighteen or twenty miles, drains an area of land comprising more than twenty thousand acres, and the valley or channel through which said creek runs and has its course averages from one to ten miles in width and discharges its waters in the Yakima River. That during certain seasons of the year, caused by the melting of snow, a large volume of water flows down, and is carried off by, the channel of said Spring Creek. That the channel of Spring Creek enters Section Twenty-nine (29) in township nine (9) north, range twenty-five (25) east W. M., on the north line of said Section and near the west line of the east half of the northeast quarter of said Section twenty-nine (29), continuing in a general southeasterly direction across said east half of the northeast quarter of such Section, and the southwest quarter of the northwest quarter of Section twenty-eight (28) in township nine (9) north, range twenty-five (25) E. W. M., to a point near the southeast corner of said southwest quarter of the northwest quarter, and continues thence easterly across, and near the south line of the west half of the southeast quarter of the northwest quarter of [4] said

4 *Oregon-Washington R. R. & Navigation Co.*

Section 28, township and range aforesaid.

4.

Some years prior to the commencement of this action the defendant, Oregon-Washington Railroad & Navigation Company, laid out and constructed a line of railway extending between the points and places specified in paragraph numbered 2 hereof, such line of railway running over and across the lands and premises also specified in paragraph numbered 2 of this complaint; and the line so constructed crossing the bed or channel of Spring Creek at a point in or near the east half of the northeast quarter of Section twenty-nine (29), township nine (9) north, range twenty-five east W. M., and the west line thereof.

5.

That when said defendant railroad company laid out and constructed its line of railroad over and across the lands of the said Section twenty-nine (29), as well as across other lands directly adjacent thereto, it was compelled to either bridge or fill the natural channel of Spring Creek at the point where said line or railway and the channel of Spring Creek intersected; that at such point defendant railway company made a fill or embankment on its own right of way for a distance of some seven hundred feet, establishing its grade five feet above the actual surface of the grade, which said grade gradually decreased in height as it proceeded easterly until it reached a surface grade near or about the east line of the northwest quarter of the northwest quarter of Section twenty-eight (28) as aforesaid, and at such latter point the land to the north started to raise as

it proceeded eastward; that said defendant company placed in the bed or channel of Spring Creek a pipe or drain 48 inches in diameter for the purposes of carrying the waters of Spring Creek under its railway bed or fill and discharging the waters of such creek in its natural bed or channel on the south side of its fill or embankment, which said pipe or [5] drain was totally insufficient to carry off the waters that would flow down through the natural channel of Spring Creek, at certain seasons of the year, as defendant well knew; and plaintiff alleges and avers that fact to be that in the years 1912 and 1914 the waters of said Spring Creek came down in such volume and quantity, the outlet for their discharge at the point herein mentioned being so totally insufficient as to cause said waters to be impounded or dammed by the embankment or fill of said railway, with the west side of Spring Creek and the raise of ground mentioned above about the east line of the Northwest quarter of the northwest quarter of Section twenty-eight forming sides therefor, causing said waters to back up against said fill or embankment to an unusual depth, and until such a depth had been reached as to cause the waters thus impounded to break over the fill or embankment of said railway line of the defendant company and to flow down, over and across the lands of this plaintiff in great force and volume doing great damage thereto, but for which injury no recovery is sought in this action; that on each of such occasions portions of the roadbed were washed away, and reconstructed by said defendant company in the same man-

ner as originally constructed, and no adequate provision being made by such company to permit the waters going down the natural channel of said Spring Creek, to pass in their accustomed way, or in any other way than through the 48 inch drain pipe as heretofore specified.

6.

That on the 23d day of January, 1916, and between January 23d and February 17th, 1916, the waters of said Spring Creek were flowing in great quantity and volume down their natural channel, the large volume of water therein being due to the melting of the snow, and said waters so flowing down the channel of Spring Creek again were impounded and backed up by the embankment or fill of the defendant company across said [6] Spring Creek, causing a large volume or reservoir of water extending from the west bank of said Spring Creek to a point near the east line of the northwest quarter of the northwest quarter of said Section twenty-eight (28), and no adequate outlet being provided therefor the same broke over such fill or embankment at or near the east line of said northwest quarter of the northwest quarter of said Section twenty-eight, and the waters thus released again swept down in great volume over and across the lands of this plaintiff, washing away the surface soil of said lands, washing away and filling with debris all flumes and irrigation ditches which were and had been constructed thereon, and cutting great gulleys or holes in said lands, thereby damaging and injuring the lands and premises of this plaintiff, and their appurtenances, in the sum of

Two Thousand Five Hundred Dollars (\$2,500) and in addition thereto the force of said waters, in their sudden rush saturated with water, thereby heating and spoiling, about four tons of hay stacked thereon which was of the reasonable value of Twelve and 50/100 Dollars per ton; further washing away lumber piled upon said land of the reasonable value of Fifty Dollars, as also the private bridge which served plaintiff in crossing said Spring Creek as the same passed across his premises, in going to and from his home, the same being of the reasonable value of One Hundred Dollars; and said lumber, hay and bridge being wholly lost and destroyed, to his damage in the sum of Two Hundred Dollars; and in addition to the foregoing a cow belonging to plaintiff was caught in the waters and thrown upon his lands, and drowned, to his additional loss and damage in the sum of One Hundred Dollars.

7.

That during the months of January and February, 1916, and for a considerable period of time prior thereto, this plaintiff was engaged in the propagation and raising for sale as breeders [7] of registered Tamworth Hogs, of valuable stock; and being the 23d day of January and 17th day of February, 1916, had upon his premises as particularly described in paragraph numbered 1 hereof, a number of such hogs, all of the Tamworth Breed, and all being registered or subject to registry as full-blooded stock; that all of said animals were properly housed in various houses upon the premises specified in paragraph numbered 1 hereof; and 13 of the sows

were due to farrow between the dates from about March 10th to April 1st, 1916; that all of said hogs and houses were flooded by the rush of said waters of Spring Creek over and across this plaintiff's lands and premises, as specified in paragraph numbered 6 of this complaint, and notwithstanding that prior thereto all of said animals were in a healthy and rugged condition, and that at all times during said flood and subsequent thereto this plaintiff practiced every precaution to prevent injury and sickness occurring by reason of the shock from and extremely cold temperature of said waters, all of said hogs developed acute colds accompanied by violent coughs. That the colds and coughs of two of said brood sows and one shoat became so acute that two died and plaintiff was compelled to kill the other, and they and each of them were a total loss to this plaintiff. That such shock and exposure caused the brood sows to farrow from ten days to two weeks earlier than the proper time for their so doing, 125 pigs being dropped by the 13 sows; that these pigs were so weak, because of their mothers' condition at the time of and prior to birth by reason of the shock and exposure as aforesaid, that 57 died shortly after birth; that this plaintiff used every effort to save the balance, and succeeded in keeping 5 alive until they were about four months of age, and 12 until about five months of age, but their weakened condition and continual coughing compelled plaintiff to kill these seventeen, and they, and each and all of them were a total loss to plaintiff. That 43 of the pigs so farrowed continued weak and

subject to [8] spells of coughing, and because of such condition, being wholly unfit for breeders, plaintiff was compelled to sell the same when 7 months of age at a great loss and sacrifice. That the two registered boars kept by plaintiff with his herd, for breeding purposes, because of their weakened condition from the shock experienced and cold contracted, were materially checked in growth and efficiency; the eleven sows farrowing early and because of such shock and continued weakened condition, likewise were wholly unfit for breeding purposes for the following breeding season; and four gelts owned by plaintiff were materially checked in growth and value as breeders because of such shock and cold contracted; all of the foregoing being to plaintiff's loss and damage as particularly itemized and specified as follows:

Loss of brood sows of reasonable value of \$100.00 each.	\$200.00
Loss of one fall shoat.....	25.00
Loss on 9 pigs, at \$10.00 each.	90.00
Loss of 57 pigs at farrowing, of reasonable value of \$7.00 each.	399.00
Loss of 5 pigs, died from cough at about 4 months, reasonable value \$15.00 each...	75.00
Loss of 17 pigs, 4 and 5mo., reasonable value \$20.00 each.	340.00
43 pigs sold for meat at about 7 months:	
43 pigs for breeders at \$25.00 each.	\$1075.
Cash received from sale as meat...	241.00
<hr/>	
Loss on 43 pigs.	\$ 834.00 834.00

10 *Oregon-Washington R. R. & Navigation Co.*

Injury to two boars as breeders.	50.00
Damage to eleven sows as breeders.	330.00
Damage to four gelts.	60.00

Total loss and damage on hogs. \$2403.00

WHEREFORE, plaintiff prays judgment against the defendant Oregon-Washington Railroad & Navigation Company, a corporation, for the sum of Five Thousand Two Hundred and Three Dollars (\$5203) together with his costs and disbursements expended herein.

(Signed) HAYDEN, LANGHORNE &
METZGER, and
LINN & BOYLE,
Attorneys for the Plaintiff.

State of Washington,
County of Benton,—ss.

Preston Royer, being first duly sworn, upon his oath [9] deposes and says: I am the plaintiff named in the attached and foregoing complaint; that I have read such complaint, know the facts therein stated, and the same are true, as I verily believe.

(Signed) PRESTON ROYER.

Subscribed and sworn to before me this 1st day of September, A. D. 1917.

(Signed) LON BOYLE,
Notary Public for Washington, Residing at Prosser,
Washington.

[Endorsement]: Filed October 15, 1917. Filed U. S. District Court, Eastern Dist. of Washington, Oct. 26, 1917. W. H. Hare, Clerk. By E. E. Wright, Deputy. [10]

*In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.*

No. 641.

PRESTON ROYER,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Answer.

Defendant, for answer to plaintiff's complaint
says:

I.

Denies any knowledge or information as to whether or not the allegations of paragraph I of the complaint are true or otherwise, and therefore denies the same.

II.

Admits the allegations contained in paragraph II of the complaint.

III.

Denies the allegations contained in paragraph III of the complaint, except that the surface water caused by melting snow and falling rain upon a certain area of Rattlesnake Hills, Benton County, Washington, sometimes flows down a gully, entering and extending across the lands described in said paragraph, but defendant denies that the drain or gully whereby said surface water flows away is a

creek or water course or stream of water, and defendant will further allege the facts in respect thereto in its further answer. [11]

IV.

Admits the allegations contained in paragraph IV.

V.

Denies the allegations contained in paragraph V of the Complaint, except defendant admits that in the gully or drain which entered and crossed Section 29 and other lands adjacent thereto, defendant filled the same, except there was retained therein a drain pipe forty-eight inches in diameter, passing through and under the defendant's railroad track.

VI.

Denies each and every allegation contained in paragraph VI, except as hereinafter alleged.

VII.

Denies each and every allegation contained in paragraph VII.

Defendant further answering said Complaint alleges:

I.

Defendant is a corporation organized under and by virtue of the laws of the State of Oregon, with its principal office and place of business in said state, but it has taken all the steps necessary and has been authorized to transact its business in the State of Washington. It is the owner of a line of railroad as alleged in paragraph 11 of the complaint, extending from Wallula to North Yakima, Washington;

passing through Benton County and along the north side of the Yakima River.

II.

Near the station of Biggam in Section 29, Twp. 9, North Range 25, E. W. M., defendant's line of railroad passes over a gully or drain. This gully or drain originates at Rattlesnake Hills five or six miles north of said point, extends in a general southerly direction until it reaches the substantially level [12] ground in Sections 28 and 29, where same turns in an easterly direction and extends to Yakima River. By means of this gully a certain area between Rattlesnake Hills and Yakima River is drained of surface waters formed by the occasional accumulation of snow and the speedy melting thereof, and except for such drainage the gully is dry during all the year.

III.

Sunnyside Canal is located a short distance north of defendant's line of railroad and extends for several miles substantially parallel therewith. It is a large canal and so situated whereby surface water resulting from melting snow and the like between Grandview, Washington and the gully or depression referred to herein and the surface water from the territory north thereof, is empounded and run down to said gully, where there is constructed a waste-way which in the winter season is left open so that the canal operates to increase the surface water occasionally flowing in said gully and depression. This canal is owned and operated by the Government of the United States.

IV.

In Section 20, twp. 9, south, range 25, E. W. M., in Benton County, Washington, the gully has become somewhat well defined, and the United States Government has constructed therein a dam, and a portion of the gully above the dam is used as an irrigation ditch, by which water diverted from Sunnyside Canal is carried to another ditch extending northerly through the lands of Mr. E. E. Starkey. Also a short distance south of the government dam Mr. Starkey had placed in said channel a dam so that the surface water, if any, should come down said gully would overflow his premises, which are located in the southeast quarter (SE. $\frac{1}{4}$) of Section Twenty (20) aforesaid. [13]

V.

On or about the first of February, 1916, and for several days prior thereto a heavy fall of snow lay upon the lands between Rattlesnake Hills and Yakima River in the vicinity of the station of Biggam, whereupon the temperature moderated and chinook winds began with the result that the snow was hurriedly melted to a certain degree and the waters therefrom flowed down said gully and also into Sunnyside Canal and thereby turned into said gully, whereby and by reason of the dams aforesaid, the lands in Section 20 aforesaid were overflowed by said surface water and extended therefrom to and over a portion of Sections 29 and 28, and thence into Yakima River. The overflow of said surface water was not caused by defendant. When said surface water flows from Rattlesnake Hills it be-

comes impregnated with silt and soil, which silt and soil is deposited upon adjoining lands if overflowed thereby and results in great benefit to said lands, renewing the soil and increasing the quality thereof, and the foregoing is the transaction complained of in plaintiff's complaint, and not otherwise.

WHEREFORE, defendant having answered the complaint of plaintiff, prays same may be dismissed and that defendant have judgment against the plaintiff for its costs and disbursements of this action.

(Signed) A. C. SPENCER,
C. E. COCHRAN,
Attorneys for Defendant.

United States of America,
District of Oregon,—ss.

I, A. C. Spencer, being first duly sworn, on oath deposes and say:

That I am assistant secretary and general attorney for [14] the above-named defendant; that I have read the foregoing Answer, know the contents thereof, and the same is true as I verily believe.

(Signed) A. C. SPENCER.

Subscribed and sworn to before me this 28th day of January, 1918.

[Notarial Seal]

(Signed) C. E. COCHRAN.
Notary Public for Oregon.

My commission expires Oct. 17, 1920.

[Endorsements]: Answer. Filed in the U. S. District Court, Eastern Dist. of Washington, Feb. 2, 1918. Wm. H. Hare, Clerk. By H. J. Dunham, Deputy. [15].

*In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.*

No. 641.

PRESTON ROYER,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,

Defendant.

Reply.

Comes now the above-named plaintiff, and replying to the affirmative answer of the defendant herein, shows to the Court:

1.

That he admits the allegations and averments set forth and contained in paragraph numbered I of said further answer.

2.

He denies the allegations and averments contained in paragraph II of said further answer, except that plaintiff admits that near the station of Biggam in Section 29, township 9 north, range 25 E. W. M., defendant's line of railroad passes over a gully; that this gully or watercourse originates in the Rattlesnake Hills and extends to the Yakima River; and that by means of this gully or watercourse a certain area between Rattlesnake Hills and Yakima River is drained of surface water.

3.

He denies the allegations of paragraph numbered III of said further answer, except that plaintiff ad-

mits that Sunnyside Canal is located a short distance north of defendant's line of railroad and extends for several miles substantially parallel therewith; and the canal is owned and operated by the United States Government. [16]

4.

He denies the allegations and averments set forth and contained in paragraph numbered IV of said further answer, except that this plaintiff admits that said gully is well defined in Section 20, twp. 9 north, range 25 E. W. M.; that the United States Government has constructed therein a dam, and a portion of the gully above the dam is used as an irrigation ditch by which water diverted from Sunnyside Canal is carried to another ditch through the lands of E. E. Starkey.

5.

He denies the allegations and averments set forth and contained in paragraph numbered V of said further answer.

WHEREFORE, plaintiff having fully replied to the allegations of defendant's answer herein, prays for the relief asked in his complaint herein.

(Signed)

HAYDEN, LANGHORNE & METZGER
and

BERT LINN and
LON BOYLES,
Attorneys for the Plaintiff.

[Endorsements]: Reply. Filed in the U. S. District Court, Eastern Dist. of Washington, Feb. 23, 1918. W. H. Hare, Clerk. By H. J. Dunham, Deputy. [17]

*In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.*

No. 641.

PRESTON ROYER,

Plaintiff,

vs.

OREGON-WASHINGTON, RAILWAY AND
NAVIGATION COMPANY,

Defendant.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff and assess the amount of recovery at the sum of Eight Hundred Seventy-five Dollars (\$875.00).

(Signed) A. C. SPALDING,
Foreman.

[Endorsements]: Verdict. Filed in the U. S. District Court, Eastern Dist. of Washington, May 9, 1918. W. H. Hare, Clerk. [18]

*In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.*

No. 641.

PRESTON ROYER,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Defendant.

Judgment.

The above matter coming on for trial, before the Hon. Frank H. Rudkin, Judge of the above-entitled court, the plaintiff appearing in person, with witnesses, and by Maurice A. Langhorne and Lon Boyle, his attorneys, the defendant corporation, appearing with witnesses and by C. E. Cochran, its attorney; the parties announcing themselves ready for trial, a jury was impanelled and sworn; and the jury having heard the testimony, listened to the arguments of counsel, and received the charge of the Court, upon their oaths do say they find the issues herein joined to be in favor of said plaintiff, and against the said defendant, and that they assess the amount of the plaintiff's damage and recovery herein against the defendant at the sum of Eight Hundred Fifty Dollars (\$850.00).

On motion of the plaintiff it is therefore hereby considered by the Court that the plaintiff Preston Royer do have and recover of and from the said

defendant, Oregon-Washington Railroad & Navigation Company, a corporation, said sum of Eight Hundred Fifty Dollars (\$850.00), and the costs of this suit to be taxed, for the collection of which said sum and costs, execution is hereby awarded.

Done in open court this 10th day of May, A. D. 1918.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Judgment. Filed in the U. S. District Court, Eastern Dist. of Washington, May 10, 1918. Wm. H. Hare, Clerk. By H. J. Dunham, Deputy. [19]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 641.

PRESTON ROYER,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that the above case came regularly on for trial before Honorable Frank H. Rudkin, Judge, and a jury at Yakima, Washington; the plaintiff appearing in person and by attorneys, Maurice Langhorne, of the firm of Hayden, Lang-

horne & Metzger, of Tacoma, and Lon Boyle, of the firm of Linn & Boyle, Prosser, Washington, and the defendant appearing by its attorneys, Messrs. A. C. Spencer and C. E. Cochran, of Portland, Oregon, and Messrs. Richards & Fontaine, Yakima, Washington.

Thereupon the following proceedings were had:

Testimony of Guy H. Heiberling, for Plaintiff.

GUY H. HEIBERLING, as a witness for plaintiff, testified:

Direct Examination by Mr. BOYLE.

Name, Guy H. Heiberling; occupation, County Engineer of Benton County, Washington. Plaintiff's Exhibit "A," a map of the lands of Wasson and Royer, was prepared by me. (The map was admitted in evidence for the purpose of illustration). Spring Creek originates about fifteen miles to the north and west of the Wasson and Royer land. The county road follows along the center line east and west through Section 28, and Spring Creek lies immediately east of the county road as established at the present time. The land of Mr. E. B. Starkey is shown on the map. I took levels [20] where Spring Creek crosses the line between Sections 20 and 29, and also where same crosses the O-W. R. & N. right of way, and found the fall to be about 8.6 feet in one thousand. The drain under the O-W. R. & N. tracks, where Spring Creek flows under, consisted of one 48-inch corrugated metal culvert, which was about four feet below the top of the track. At this point the line of the O-W. R. & N. Co. is on

(Testimony of Guy H. Heiberling.)

an embankment or fill, which is about eight feet deep. The fill extends from the creek six or seven hundred feet east of the county road over in Section 28, where it passes from embankment to a slight cut.

Further Examination by Mr. LANGHORNE.

With the exception of a few months I have lived in Benton County since the fall of 1908. Plaintiff's Exhibit "B," purporting to be a map of part of Benton County issued by the Department of the Interior, is shown me and I can trace from this map the course of Spring Creek. The upper limits of the head shown in Sections 25, 11 and 24, and it runs generally southeasterly at the head and bears southwesterly for three or four miles, then southeasterly into Yakima River. The topography of the land from where Spring Creek has its origin is rolling, but Spring Creek is in a canyon until a short distance from the O-W. R. & N. right of way, where the ground spreads out flat. The channel is well defined and rains twenty or twenty-five thousand acres, coming down from various gulches into the Spring Creek Gulch. The fall from the source to where it crosses the right of way of the O-W. R. & N. Co. is something over two thousand feet. Where Spring Creek runs under the right of way of the O-W. R. & N. Co. there has been a fill on each side of the creek. On the east side the grade tapers gradually to nothing in about thirteen or fourteen hundred feet. The annual snowfall in the hills north of the railroad right of way varies from noth-

(Testimony of Guy H. Heiberling.)

ing to as high as 18 inches. In January, 1916, at Prosser, there were two [21] different snowfalls—one of these twelve and the other fifteen inches—and there is usually heavier snow in the hills. This snow generally begins to melt whenever the chinook winds come, and it melts rapidly then.

Cross-examination by Mr. COCHRAN.

Spring Creek, from the section line of 20 and 29, meanders back and forth. One standing in the bottom of Spring Creek at the O-W. R. & N. right of way, attempting to look up towards Mr. Starkey's place north, will find the creek so crooked that a straightline vision will not pass up the creek channel. The gully from which Spring Creek comes out of the Rattlesnake Hills begins to widen at point about the north line of the southeast quarter of the southeast quarter of Section 20. Mr. Starkey has quite a flat place—about ten acres or so—which would be located substantially in the southeast quarter of the southeast quarter of Section 20. The base of the bluff is about the section line between 20 and 29 on the west side of the creek.

Plaintiff's Exhibits "A" and "B" are hereto physically attached and made a part of this bill of exceptions.

Testimony of Preston Royer, for Plaintiff.

PRESTON ROYER, as plaintiff and as witness on the part of Mr. Wasson, testified:

Direct Examination by Mr. BOYLE.

Name, Preston Royer; own the lands described in

(Testimony of Preston Royer.)

my complaint, amounting to practically nineteen acres. I bought the land in the spring of 1914. I have lived along the branches of Spring Creek since the fall of 1905, and at one time lived in the Rattlesnake Country, Spring Creek passing through my homestead. The waters coming down Spring Creek is caused by the melting snow and it comes down in a series. In that country our weather goes in a circles—we will have a period of dry [22] seasons, very little moisture, poor crops, and a series of good moisture and good crops. Spring Creek runs practically every year when there are good crops and in dry seasons does not run at all. In 1907 the water down Spring Creek went through a 24-foot breach, practically four feet deep. There is no outlet other than under the O-W. R. & N. crossing. From 1906 to 1912 there was water in more or less volume running each season. This water flows to the Yakima River and the only outlet is under the O-W. R. & N. tracks. In June or July, 1914, the water crossed my ranch.

The following question was asked the witness:

Q. Just explain that to the jury.

Mr. COCHRAN.—I submit that is immaterial.

The Court overruled the objection, to which an exception was allowed.

A. In 1914, in the last of June or the first of July, there was a freshet in the Rattlesnake Hills in the watershed of Spring Creek, and water ran down this creek to where same intersects with the O-W. R. & N., where they have a 48-inch pipe. It was not suffi-

(Testimony of Preston Royer.)

cient to carry the water off and it backed the water up and it flooded straight east and west down the pit to the county road, washed out the county road to a considerable depth, and went on down where the railroad comes to the surface grade and crossed right through and ran off for five or six hours over our place.

(Witness excused temporarily. (Trans. 21.)

Testimony of Samuel H. Mason, for Plaintiff.

SAMUEL H. MASON, as a witness for plaintiff, testified as follows:

Direct Examination by Mr. LANGHORNE.

Name, Samuel H. Mason; residence, Yakima; lived here about six years all told. I homesteaded the Wasson place in 1900, owned it about ten years. I am acquainted with Spring Creek where it now leaves the O-W. R. & N. right of way to the Yakima River, approximately [23] a couple of miles. The channel is not regular—in places good and wide and other places deep. It is about four to eight feet at the bottom, the depth being irregular.

Q. Did you ever see water going down that channel?

A. Yes, the water came there in the channel in the spring when the snow would come on the Rattlesnake Hills, and melt off suddenly.

The witness proceeded:

These waters passed through the channel to the river, and at my place at the deepest time it was probably two to two and one-half feet deep, and in

(Testimony of Samuel H. Mason.)

the narrowest places deeper. While I owned the place the waters never came over the land. It generally followed the course of the creek—only time it got over was when banked up but not washed down over the land.

Cross-examination by Mr. COCHRAN.

Spring Creek carries water during the spring freshets. The time would vary. The only time I knew water to run there any time was when the snow would come on the Rattlesnake Hills and would melt and go off suddenly; would seem to absorb the water in the wintertime when it went off gradually, but when the sun and wind melted it suddenly always had these freshets in the spring. The time of the melting depends entirely on the presence or absence of these chinook winds.

Q. And where the water did go off suddenly that would be accomplished, say, within a period of ten to twenty days?

A. I never saw it last that long as a rush of waters, but when this water run down there in the creek it would be a month or so until it all went away when plenty of snow in the mountains, but a rush of waters would be generally two, three or four days.

Q. Apart from any water, if there were such coming into [24] Spring Creek from the Sunnyside Canal, how many months of the year do you say Spring Creek is dry?

A. It is dry a good deal of the time. I don't think water runs there regularly from freshets over two months of the year. (Trans. 25.)

**Testimony of Preston Royer, for Plaintiff
(Recalled).**

Direct Examination by Mr. BOYLE.

The banks of Spring Creek vary, being well defined for probably fourteen miles above Mr. Starkey's place, there are distinct channels and have to be bridged; they expect water in these and they put in bridges. In 1916, on January 20th, there was from twelve to sixteen inches of badly drifted snow, and Spring Creek and the ditches and canals up to the top of the hill were leveled across in many places, practically no snow on the level lands but the snow was drifted into depressions. From the level lands to a distance of five or six miles up the Rattlesnake slope there was no snow. Above that there was. Also the canyons are much deeper at the top, and these were full of snow. The ground was frozen and the water could not go into the ground. The chinook winds started at 11:30 January 20th and stopped at night. January 21st, a southwest wind, mostly clear, and checked at night. January 22d southwest wind. January 23d, southwest wind. The snow melted and the high water went across my place at 5 o'clock and run about five hours in the afternoon. It destroyed the roadbed at a great distance, broke through a stretch of railroad track, went over the ties and washed a deep hole through the railroad onto the Wasson land and then to my land. On Monday following there was a cold northeast wind and it froze hard, which checked the flow of the water. Weather stayed frozen and we got some snow, probably fifteen

(Testimony of Preston Royer.)

inches, until the next chinook came. The next chinook wind started February 7th and was a clear day—with from twelve to fourteen inches badly [25] drifted snow. The wind changed and on February 9th the water started running, and on the 10th the water went over my place and over the Wasson place. The water backed up on the north side of the embankment and run down a borrow pit east and then passed across the railroad track and down over Mr. Wasson's land and my land until it met the old channel of Spring Creek.

With respect to the Wasson land, this land slopes southeast and was planted to alfalfa, and when the water came over that land would wash holes, many of them fifteen feet long and three or four feet wide, making it impossible to irrigate it and impossible to go over it with a cutting machine. The water went over my land and washed the soil somewhat. I was following the business of raising registered hogs—Tamworth hogs. I had thirteen brood sows, two boars and four gilts, and I think nine pigs, fall pigs. They were registered or eligible. The sows were heavy with pigs, due to farrow the first of March to about the 21st. The hogs were penned up. When the water came across I turned them loose in the water. The effect was that these sows had their pigs from ten days to three weeks ahead of time. The sows were worth \$150 each prior to farrowing. After their experience, the market value was between 7 and 8 cents per pound. The young boar was worth \$100 before the injury and the older boar was worth \$250.

(Testimony of Preston Royer.)

Afterwards the young boar was valued for meat only—say, \$15. The other one was damaged I would say only to the extent of \$25—that is, he would be worth \$225 after the injury. I had between six and seven tons of hay worth \$12.50 per ton, of which four tons was rendered worthless. I lost a cow worth \$100. There was a bridge across Spring Creek.

The following question was asked:

Q. What was the bridge worth?

Mr. COCHRAN.—I make the point such damages are not proper measure and the recovery cannot be made that way. It is immaterial and incompetent.
[26]

The COURT.—Well, the form of the question makes very little difference one way or the other. You can answer the question and I will allow exception.

A. One hundred dollars.

Examination by Mr. LANGHORNE.

There were 40 to 45 acres of the Wasson land in alfalfa.

Q. You were acquainted somewhat with the value of land in that vicinity, were you?

A. Yes, I know when a place sells and what is sold for.

Q. What in your opinion was the 40-acre tract of Wasson's worth before the flood?

A. I would say worth \$200 per acre before the flood.

Q. After the flood, what would you say the 40-acre tract was worth, in your opinion?

(Testimony of Preston Royer.)

A. I would say \$75.00 per acre. (Trans. 47.)

Cross-examination by Mr. COCHRAN.

Between the latter part of the year 1915, up to the 23d of January, 1916, I do not know of any sales in that vicinity, nor were there any sales previously for several years. The Wasson place was covered with water in 1916 to the extent of between 40 and 45 acres. When the water came down on the 23d of January, it ran for five hours. I did not turn my pigs out at that time. Between the 23d of January and the 7th of February about fifteen inches of loose snow fell, followed by freezing weather, and no water came down until about the 7th of February. The water would check at night and flow again in the daytime. I have been acquainted with Spring Creek since 1905. The creek is always dry in the summer, above the Government's canal. It is dry in the aggregate over eleven months in the year, and sometimes it does not run that month. There must be snow in the hills to put water in [27] that channel, by the chinook winds. If it melts gradually, and no frost in the ground, you have no water in Spring Creek. If it melts off in the winter, melts gradually, it probably runs in warm weather. The chinook was what brought the water down. The gully through which the water drained was practically drifted full of snow. After January 23d, when the 15 inch snow storm came, a second chinook wind came and the snow became more dense and more dense, until it finally became water in part, and started to flow down. The snow that had not yet congealed would

(Testimony of Preston Royer.)

hold it back for a while until the water would break through and it would come down in bunches, and the channel on the flat between the O-W. R. & N. and Starkey's place would possibly have a tendency to fill up and cause the water to spread. Spring Creek channel at my place was full of snow at that time and it had to work down gradually. I did not farm my place in 1916. (Trans. 56.)

Testimony of M. C. Williams, for Plaintiff.

M. C. WILLIAMS, Division Engineer, First Division, O-W. R. & N. Co., testified:

That the railroad track runs approximately east and west, and the grade of the track where it crosses Spring Creek is one-fifth of one per cent, ascending towards Grandview.

Testimony of Lee M. Lamson, for Plaintiff.

LEE M. LAMSON, a witness for plaintiff, testified:

Direct Examination by Mr. BOYLE.

Name, Lee M. Lamson, Kennewick, Washington; County Agricultural Agent of Benton County, have been for five years; acquainted with the Wasson and Royer land prior to January, 1916; examined the Royer land at Mr. Royer's request to give him advice whether the corn needed irrigation. There were six or seven acres of corn and probably five acres or so of a poor stand of alfalfa. The soil is a very fine sand, with a gravel subsoil. I examined [28] the land in March, 1916. The flumes were torn down,

(Testimony of Lee M. Lamson.)

the land was cut up pretty badly with little rivulets. In a good many places the surface soil was washed off entirely, so it was washed down to the gravel. The humas which was on the surface was washed off. I went over the Wasson land at the same time. The water had cut out ravines. A good many were from a foot to two feet deep—some were less. The alfalfa crown were all the way from three to ten inches above the ground. The irrigation ditches were hardly recognizable. The only practical thing to do would be to plow it up and relevel it and reseed it. In my opinion the Wasson land was worth between \$160 and \$175 an acre before the flood, and afterwards probably sixty to seventy-five; and the Royer land in my opinion was worth \$130 per acre before and thirty to forty dollars afterwards. I received my education at the State College, specializing in animal husbandry, and am familiar with hogs. As breeders, in my opinion, the Royer sows would be worth \$175 or \$180 for the biggest sows he had; afterwards, as breeders, nothing at all, and for any purpose they would be worth probably four cents a pound.

Cross-examination by Mr. COCHRAN.

I never knew of Mr. Royer selling any of his breed sows for \$175 to \$180 each. I never heard that he sold one to Mr. Johnson for \$40. I did not measure the amount of land upon the Wasson place that the water passed over, although the line of the flow was fairly well marked with drift weeds. The water did not go over all of the land below the railroad track.

(Testimony of Lee M. Lamson.)

The Wasson place could have been leveled all right, and it would approximately cost thirty to thirty-five dollars per acre to relevel it and reseed it. I examined the land north of the railroad; nothing washed out there but some soil washed on to it. This to some extent would be a benefit, the soil will act somewhat in the nature of a fertilizer. I have known of no sales of land prior to January, [29] 1916, similar to the Wasson place, nor of any sales after the January flood in 1916. (Trans. 68.)

Testimony of Luke Powell, for Plaintiff.

LUKE POWELL, as a witness for plaintiff, testified:

Direct Examination by Mr. BOYLE.

Name, Luke Powell; residence, Prosser, Washington; District Horticulturist, State of Washington; acquainted with the Wasson and Royer land about January 1, 1916; was with Mr. Lamson and went over the land in March of that year. The soil was washed and a number of gullies washed, from six to eighteen inches and as wide as a foot to fifteen inches. Some of the alfalfa was washed but a good deal of it the crown would stand up four to ten inches. In my opinion Royer's land was worth \$160 to \$180 per acre, and after the flood about \$25 per acre. The Wasson land about January 1st was worth \$175 to \$200 per acre, and afterwards from \$65 to \$100 per acre.

Cross-examination by Mr. COCHRAN.

I never bought or sold any land like the Wasson

(Testimony of William J. Wasson.)

and Royer land about January 1, 1916, nor for a year or so prior thereto, nor do I know of any special or general sales. (Trans. 71.)

Testimony of William Wasson, for Plaintiff.

WILLIAM J. WASSON, plaintiff in his own case, and on behalf of Mr. Royer, plaintiff in the Royer case, testified as follows:

Direct Examination by Mr. LANGHORNE.

Name, William J. Wasson, owner of the land described in the Wasson complaint; was at Centralia, Washington, at the time of the flood in 1916; came to Prosser, March 2d, went over the land and saw the flooded area. The irrigating ditches were washed out, the rows that you irrigate with were washed and cut crossways so that you could not possibly carry water down over it and irrigate it. I should judge in the neighborhood of forty-five acres of my land was left in this condition. I placed a value of \$250 per acre on the best land before the flood, and would not consider [30] it over half that value afterwards. The land was leased for the cropping season of 1915. For 1916 it was not leased. The water crossed the railroad track practically 150 feet wide and as it came down over my place it spread out. (Trans. 87.)

Testimony of L. D. Lape, for Plaintiff.

L. D. LAPE, as a witness for plaintiff, testified as follows:

Name, L. D. Lape; residence, Prosser, Washington, for 22 years; business, real estate; acquainted

(Testimony of L. D. Lape.)

with land values in and around Prosser and vicinity; acquainted with the Wasson and Royer lands, known same for 22 years. In my opinion the Wasson tract before the overflow was worth \$175 to \$200 per acre, the Royer tract \$160 to \$185 per acre.

**Testimony of M. C. Williams, for Plaintiff
(Recalled).**

M. C. WILLIAMS, recalled as a witness for plaintiff, testified:

Direct Examination by Mr. LANGHORNE.

The original right of way of the railroad company was forty feet on each side of the center line of the railroad. Afterwards the property owners immediately adjoining the right of way on the north added an eighty-foot strip clear across the forty acres at Biggam. That would make 120 feet on the north side and 40 feet on the south side. The 80 feet has since been deeded to the county for road purposes.

Plaintiff rests.

Mr. COCHRAN.—We desire to move for a judgment of nonsuit in each of these cases upon the following grounds.

First. The water in question is shown by the evidence as surface water and is a common enemy. In respect to surface water I think the Federal Courts follow the rule adopted in the courts of the State where the alleged cause of action arises.

Second. The complaint in each of these cases is drawn upon the theory that actual damage resulted from the flow of surface water. Under these cir-

cumstances, there is no legal liability and [31] the complaint would not state facts sufficient to constitute a cause of action.

Third. The channel called "Spring Creek" and by which it has been designated in the complaint, the evidence shows is nothing more or less than a mere drainage of surface water, resulting from melting snow or the action of chinook winds operating thereon, and that such water may be defended against, may be dammed up, the channel may be closed or open in part and closed in part and that no actionable damage results, and that the evidence shows that the railroad bridge was built for the purpose of being used by the railroad and in accordance with good railroad building, and that if surface water of the type and kind shown by the evidence overflows, it becomes a cause of damages without injury.

The COURT.—The motion will be denied. (To which ruling an exception was allowed.)

Testimony of I. J. Oder, for Defendant.

I. J. ODER, as a witness for defendant, testified as follows:

Direct Examination by Mr. COCHRAN.

Name, I. J. Oder; residence, Yakima, Washington; occupation, raising hogs, have been for two or three years. I have been on a farm most of my life, during which time handled hogs. In 1906 and 1907 I was manager of the college farm at Kingfisher, Okla., and was engaged in breeding thoroughbred Duroc hogs extensively. Since coming to Yakima Valley I have handled and bred thoroughbred hogs,

(Testimony of I. J. Oder.)

and sold and disposed of same, including the Tamworth, Hampshire and Duroc breeds. I have at the present time 208 head. I have had experience in observing the effect upon thoroughbred hogs of their being overflowed and submerged in water. During the month of December, 1917, in the Naches River, which borders my place, a flood came, in fact one of the biggest floods we have ever had in that location, and it overflowed my hog-yard. They were actually in the water part way on their bodies, five of them at least, [32] from twelve to thirty-six hours. Assuming that Mr. Royer's hogs had become submerged with water, say five hours, and then more or less for a period of three or four days, but not continuously, in my opinion, from my experience, it would have had no bad effect upon them. Three of my sows were very heavy with pig that were in the water three, twelve to thirty-six hours. Three of these sows farrowed within three weeks, and one bore ten, another twelve and another thirteen live, strong pigs. Two of these were Durocs and one Berkshire. I had two Tamworth mature sows and three Tamworth mature gilts that have farrowed since. The first Tamworth sow farrowed eleven pigs, the second nine and I think the third had seven live pigs. They were all good healthy pigs. I am acquainted with the market value of such stock in January, 1916. Gilts were worth \$20 and mature sows \$30, with pedigree on them for breeding purposes. According to my experience, hogs passing through a flood such as has been described are not

(Testimony of I. J. Oder.)

injured thereby in the market, any less for any of the purposes for which they may be used.

Cross-examination by Mr. BOYLE.

Although my hogs were in the flood around the last day of December, 1917, there was no bad effects from it at all. This water was snow and ice water from the hills, through the Naches River. (Trans. 104.)

Testimony of A. M. Cale, for Defendant.

A. M. CALE, as witness for defendant, testified as follows:

Direct Examination by Mr. COCHRAN.

Name, A. M. Cale; residence, Yakima; occupation, have been raising stock all my life, for sixty years; have seen Tamworth hogs raised and know about them, and have been familiar with that breed for three to five years, also with the Berkshire, Duroc and Hampshire hogs.

I am acquainted with the market value of Berkshire and Hampshire hogs, not the Tamworth. They are worth in the market [33] \$4 to \$5.75 per hundred pounds. They are not *worth any* other hogs, just the same. I never gave any more for them. I have seen such hogs in a flood submerged in water. A good many years back I lived on the river and raised a great many hogs, from five hundred to a thousand head, and they have been in water a great many times. Hogs that have been bred and due to farrow in three or four weeks I have seen such hogs

(Testimony of A. M. Cale.)

in the water, and in my experience I don't think it had any effect on them.

Cross-examination by Mr. BOYLE.

I have raised a great many Hampshire, Berkshire and Duroc hogs for breeding purposes and all I could get for them was the same as other hogs, from \$4 to \$5.75 per hundred pounds. A registered hog due to farrow is worth from ten to thirty dollars more for breeding purposes than in the market, owing to the size and condition of the hog. I think a good brood sow is worth from \$20 to \$30. (Trans. 110.)

Testimony of Christ Nelson, for Defendant.

CHRIST NELSON, a witness for defendant, testified as follows:

Direct Examination by Mr. COCHRAN.

Name, Christ Nelson; residence, Biggam, Washington, in the vicinity of where Mr. Wasson's and Mr. Royer's land is located. I was acquainted with the Royer herd of hogs in the winter of 1915 and 1916. The place where he kept the hogs was naturally damp and there was a lot of snow on the ground just before the flood. His hog pens were in a "V" shape and the pens were naturally damp and wet. Mr. Royer's hogs were not fat, they are skinny, long skinny hogs. This was their condition in the early part of January, 1916.

Cross-examination by Mr. BOYLE.

The pens were in good condition for their kind.

(Testimony of Christ Nelson.)

I saw the hogs just before Christmas. Some of the pens had no floors in them.

Cross-examination by Mr. LANGHORNE. [34]

I have lived at Biggam ten years; am a farmer.
(Trans. 113.)

Testimony of Dr. G. W. Ridgeway, for Defendant.

Dr. G. W. RIDGEWAY, as a witness for defendant, testified as follows:

Direct examination by Mr. COCHRAN.

Name, G. W. Ridgeway; occupation, veterinary surgeon; residence, Yakima, Washington; followed this profession forty years. I have had a little experience in treating hogs. Pneumonia in hogs is caused from a cold. It is not necessarily produced from wet conditions around the pens; sometimes caused by a cold draught in the open and unprotected. A cold draft is more apt to give it to them than anything else. This cold draught operates in that respect the same as in a human being.

The COURT.—So far as pneumonia is concerned, I presume a hog is human.

A. Yes. (Trans. 116.)

Testimony of M. C. Williams, for Defendant.

M. C. WILLIAMS, a witness for defendant, testified as follows:

Direct Examination by Mr. COCHRAN.

I am the same witness that was on the stand for plaintiff. I was resident engineer in charge of construction. The definite location of the railroad

(Testimony of M. C. Williams.)

across the land in controversy was made before I went on the work, but I was resident engineer when the track was building. This was in 1910 and 1911. I have been acquainted with the drain called Spring Creek since 1907. I had been back and across this territory a number of times between those dates connected with the defendant in an engineering capacity. I prescribed the size of the culvert at Biggam after inquiring as to water conditions from residents in the immediate vicinity who had lived there a number of years, and after such inquiry I put in a culvert 48 inches in diameter, circular in form. From the information received it was my opinion this 48-inch diameter was sufficient in size to carry off the normal flow of surface water that came down. The water flowage [35] conditions in 1916 in Yakima Valley and throughout the eastern part of Washington in January, 1916, were far greater than any since 1906. There was more run off and more snow. In the winter of 1915-1916 there were two heavy snows in the early part of the year 1916. One was twelve to fourteen inches, which all went off the ground, and was followed by a twelve to eighteen-inch snow after that, which went off in the early part of February. Plaintiff's Exhibit "B" is a topographical map of the Prosser quadrangle, including Sections 20, 21, 28 and 29, the lands in question; contains contour lines showing points of similar elevation on the natural surface of the ground. The contour distance is fifty feet. Where the lines are far apart would indicate a flat.

(Testimony of M. C. Williams.)

Am acquainted with the location of Sunnyside canal. During the winter season the spill-way has been left open, whereby melting water drains into the canal, and from that into Spring Creek. Referring to the course of Spring Creek from the county road south of Starkey's place there is a small rock dam near the fence, and as you go up the channel there are several other small obstructions, but the main dam is the one that has been put in by the Sunnyside Reclamation people, which is the outlet of the lateral that runs around the base of the hill. The dam is in the neighborhood of forty feet in height. Document marked for identification Defendant's Exhibit No. 1 is a blue-print map showing the area in controversy prepared under my direction, illustrating the land of Mr. Starkey, Mr. Wasson and Mr. Royer, Biggam station and the course of certain channels and drains made from surveys, and also showing the course of the water and the overflow, which was received in evidence and marked Defendant's Exhibit No. 1. After the water passed over the wasteway, the water came down in such volume that the original channel was so small as to be unable to carry the water, and it overflowed and spread out over the land, forming two channels in Mr. Starkey's field, one marked on the map "original channel" [36] and the other "overflow channel." It passed on down to the next forty below, which would be the southeast quarter of the southeast quarter of Section 20 and the channels came together again as a main channel with the exception the water spread out to

(Testimony of M. C. Williams.)

a considerable extent on the ground. The water overflowed the greater part of Mr. Starkey's land, running entirely out of the channel, and then as it comes to the south line of Section 20 it strikes the other dam, which had been put in just north of the county road, and again spread out, and as a matter of fact considerable amount of it has never struck that dam as the elevation of the dam has nothing to do with that just above the southeast quarter of Section twenty. The colored area on the map, Defendant's Exhibit No. 1, across the land of Mr. Wasson and part across Mr. Royer's land, illustrates the course of the water, and the map was made from notes of surveys taken shortly after February, 1916. The part colored purple illustrates the exterior areas of the flowage, and shows the overflow just as it happened.

Cross-examination by Mr. LANGHORNE.

Before I put the 48-inch pipe in I made inquiry from residents in and around Biggam as to flowage of water down Spring Creek, also made an independent investigation by going practically to the foot of the main Rattlesnake Hills, where the three branches of Spring Creek come in; also consulted a Government survey which I believe was made by the Reclamation Service, also took into consideration that the spillway from the Sunnyside canal would dump some water therein. I figured about twenty second-feet would be the flow. (Trans. 126.)

Testimony of Edward L. Short, for Defendant.

EDWARD L. SHORT, a witness for defendant, testified as follows:

Direct Examination by Mr. COCHRAN.

Name, Edward L. Short; occupation, civil engineer, five years in the employ of the defendant; headquarters, Walla Walla, [37] third district, including Yakima Branch. At request of defendant, surveyed the lands in question, first on the 21st and 22d of March, 1916; made the notes of Defendant's Exhibit No. 1 and measured the area of the overflow on the Wasson and Royer lands. The line between the area overflowed and the area not overflowed could be found and distinguished by small drifts or weeds that had lodged against the alfalfa. The map has marked upon it the different areas of land and those figures are correct.

Testimony of Alfred Gobalet, for Defendant.

ALFRED GOBALET, a witness for defendant, testified as follows:

Direct Examination by Mr. COCHRAN.

Name, Alfred Gobalet, civil engineer and draftsman; residence, Walla Walla. Was with Mr. Short on the day certain surveys were made in respect to Royer and Wasson lands. The exterior lines of the portion colored purple on Defendant's Exhibit No. 1 were arrived at by indications of sediment that was carried by the water and left on the alfalfa and by little straws that the water left on the outer edge. The areas in the map are correct. (Trans. 136.)

Testimony of W. H. Alsberry, for Defendant.

W. H. ALSBERRY, a witness on behalf of defendant, testified as follows:

Direct Examination by Mr. COCHRAN.

Name, W. H. Alsberry; residence, Zillah; occupation, fruit buyer and shipper; in respect to lands, have had eight years' experience in dealing in lands. Have bought and sold land in Yakima County and am acquainted with general land conditions in Yakima Valley from Yakima to Benton City. At defendant's request examined the Royer and Wasson land in March, 1916, with Mr. McDonald, Claim Agent, and Mr. Furman of Zillah, and the section foreman,—examined the land thoroughly. Noted some soil that washed upon the land, which is a benefit. On the Wasson land there were some little pockets washed out and holes now and then in the ground, just as I have had it in land I have been farming where a little ditch would [38] wash out. I have had experience in leveling off and know the cost of leveling places, and I estimate that it would take \$58, counting \$4.50 per day as the price for a Fresno scraper and teams to level it and smooth it over as good as it was before, which would include fixing the laterals. There was no soil washed off the Wasson place, only in these pockets. As to the Royer place, I could not see that any damage was done to it, other than that the dam was washed out which he had put in the old channel. I noted that cornstalks and other articles were lying loose on the

(Testimony of W. H. Alsberry.)

field, and were not washed, so the flowage could not have been very great.

Cross-examination by Mr. LANGHORNE.

Lived at Zillah, Washington, twenty years. Followed occupation of farming seven years.

Testimony of Cornelius H. Furman, for Defendant.

CORNELIUS H. FURMAN, as a witness for defendant, testified as follows:

Direct Examination by Mr. COCHRAN.

Name, Cornelius H. Furman; residence, Zillah, Washington, thirty-five miles from Prosser; acquainted with lands around Prosser; have had twenty years' experience in dealing with land in this country. Examined the Wasson and Royer lands at request of defendant. I estimate that labor to the value of \$50 or \$60 would put the Wasson place in good condition. The market value of the Wasson land in the year 1915 would not exceed \$75 per acre and the Royer land would not exceed \$60 per acre. The soil was not washed out to speak of, cornstalks were still there on the place, manure dropped in the pasture by horses and mules was undisturbed and lying on the flowage area just the same as on the area not flowed. (Trans. 149.)

Cross-examination by Mr. BOYLE.

Did not see this particular land before the flood, but without a water right the Royer land would not exceed in value Ten [39] Dollars per acre. I knew of some land four miles above the Wasson and

(Testimony of Cornelius H. Furman.)

Royer places selling for \$75 an acre. The \$50 to put this land in shape we figured was the cost of the team work. (Trans. 150.)

Testimony of E. E. Starkey, for Defendant.

E. E. STARKEY, as a witness for defendant, testified as follows:

Direct Examination by Mr. COCHRAN.

Name, E. E. Starkey; residence, Biggam, Washington, near Prosser. I lived on the land illustrated by Defendant's Exhibit No. 1 and marked "E. E. Starkey," which would be the southeast quarter of the southeast quarter of Section 20; lived there nine years was on the farm in January, 1916. In January, 1916, Spring Creek drain overflowed the western part of the north half of the north forty, breaking out of the natural channel, and flowed out inside the opening where it drains south and west to a limit probably 150 yards, spreading out over the land to what is known as the government dam and below the dam I had constructed a new channel to check up against it and prevent washout. Next day, when the water came, it broke over at the point where the arrows on Defendant's Exhibit No. 1 show at the point called "Plow land." The creek bed at that time was full of snow and ice. The first flow could not get through the channel because of the ice and snow. At the south line of my place I constructed a check, consisting of a rock dam, probably eighteen inches to two feet high, and I had a dike along the south side of my place to check the sediment. I have

(Testimony of E. E. Starkey.)

been acquainted with the Wasson lands for eight years, and have been over a considerable part of it during the time of the flood last winter a year ago, and I have been over it several times since. I have helped harvest crops on the land several times and have mowed the crops of the Royer place. The water entered Mr. Wasson's place in 1916 in two different places, at the railroad east of the county road and at the west side where it broke through the railway. Where the water left the railroad right of way it was from forty to sixty [40] feet wide and very shallow, and its greatest width was probably 350 feet. Part of it turned east where there was a wagon road, illustrated on Defendant's Exhibit No. 1 as "blown out wagon track, northwest channel." In Mr. Wasson's place it spread out considerably, but did not flow deep at any point, and washed out the dirt from the irrigation ditches and between the alfalfa somewhat. I do not think the general width on the Wasson place was over an average of seventy-five feet. It did spread, however, to twice that width, especially when this water come in from the west side. The soil on the Wasson land is particularly clean of rock; there is one little gravel bed not very far from where these two streams met and there were no washes to amount to anything. The wash covered possibly three and a half to four acres. There was no injury to the land except that was washed out by the soil, possibly a quarter of an acre. I have had considerable experience in leveling ground having to meet the tricks of that creek for the past nine years in

(Testimony of E. E. Starkey.)

leveling more or less. There was no washout in this alfalfa field, the little distance of six to twelve feet and no greater than across this room, and the longest ditch that was twelve inches deep was no longer than thirty or forty feet. To put this land in condition for working would be a very small matter, possibly a day and a half or two days work with a team. In fact, the ditches that were washed out did not injure their irrigation ditches. They were deeper and there was no alfalfa washed out except at the top at a few places, so the stumps set up, the plant would stand up a few inches above the ground and would leave the alfalfa still standing on the ground, but this did not cover an area half the size of this courtroom. There was no material washed away to speak of. I do not believe a farmer estimating the use of the land could find enough washed ground to affect it in a serious way. I have kept in touch with the sales of land in this vicinity, and although there has been little selling in recent years, I have known of a few sales. [41] I would estimate Mr. Wasson's land, one lot at one hundred dollars per acre, but not to exceed eighty-five dollars per acre as a tract. The best part of the land was flooded over, and I would regard the fair market value of that before the flood to be about \$150 per acre. I do not consider the value was changed a great deal after the flood, but of course, the damages to make up correction of the ditches, which I think would amount to \$15 or \$20. I have done a great deal of the same kind of repairing on my own place, and my experience

(Testimony of E. E. Starkey.)

convinces me that it could be very easily done. I was over the Royer place several times. I frequently cross it—over it first in 1910 and frequently since. The point where the water entered the Royer land was of fairly slight slope, there was from one and a half to three acres covered by the water. In my opinion the value of the land before the flood would be about \$75 per acre, and by the flood it was rendered less valuable to the extent of the repairs, which would amount in my judgment to probably twenty-five dollars in work. I am acquainted with Mr. Royer's herd of Tamworth hogs. At the time my boy was interested Royer gave me his prices, and the highest I remember looking at was \$35, and he had some at a smaller price at that time. (Trans. 162.)

Testimony of T. J. Good, for Defendant.

T. J. GOOD, a witness for defendant, testified as follows:

Direct Examination by Mr. COCHRAN.

Name, T. J. Good; residence, near Biggam; have been acquainted with the Royer and Wasson lands since 1910; knew about the water passing over them in 1914 and 1916. The Royer place in 1915, in my opinion, would be worth \$85 to \$90 per acre, and the Wasson place from \$80 to \$125 per acre. I would consider each place rendered less valuable by the water having passed over it to the amount necessary to fix them up, say about \$100 for each place. (Trans. 170.) [42]

**Testimony of E. L. Short, for Defendant
(Recalled).**

E. L. SHORT, a witness for defendant, being recalled, testified as follows:

Direct Examination.

I made a survey for the purpose of determining the lay of the ground on that area bounded by the railroad track on the south and Mr. Starkeys farm on the north, the county road on the east and Spring Creek on the west, and made a map marked for identification Defendant's Exhibit No. 2, which was prepared from my notes, which exhibit was offered and admitted in evidence and marked Defendant's Exhibit No. 2. I run levels on certain lines marked a, b, c and d. This map correctly shows the lay of the ground. Water on the southeast corner of Mr. Starkey's field, the southeast quarter of the southeast quarter of Section 20, would flow almost directly south from this point to the southeast and would not flow to the culvert. The line of levels marked C and D show the ground to be higher than further east. Water flowing from Mr. Starkey's field would flow right across the county road. The arrows on Defendant's Exhibit No. 1 indicate the course of the water. (Trans. 180.)

Defendant rests.

**Testimony of B. R. Sherman, for Plaintiff (In
Rebuttal).**

B. R. SHERMAN, as a witness for plaintiff in rebuttal, testified as follows:

(Testimony of B. R. Sherman.)

Direct Examination by Mr. BOYLE.

The waste water from Mr. Starkey's ranch in 1916 never went any further than this corner, referring to the corner caused by the county road crossing the railroad.

Plaintiff rests.

THEREUPON, the defendant requested the Court to instruct the jury in the manner following:

Instructions to the Jury Requested by Defendant.

I.

Gentlemen of the Jury, under the view the Court takes of the law in this case, your verdict should be in favor of the defendant, [43] and I therefore instruct you to that effect.

The Court refused to give the foregoing instruction, to which refusal defendant excepted, and its exception was duly allowed.

II.

I instruct you that defendant had a right to build its railroad embankment at the place and in the manner which the evidence shows the same was built.

The Court refused to give the foregoing instruction, to which refusal defendant excepted, and its exception was duly allowed.

III.

I instruct you that under the evidence in this case the so-called channel of Spring Creek was nothing more than a drain for surface water resulting from melting snow in the drainage area above the lands in question and that other than from such melting snow the channel of Spring Creek carries no water

and is dry for eleven months out of the year. This surface water is a common enemy against the flowage of which every land owner must defend himself, and I instruct you that the defendant in this case did nothing in respect to such surface water other than what it had a right to do in respect to its own property and in building its own railroad embankment. It had a right to place its embankment across Spring Creek drain, leaving whatever opening its engineers decided upon, and that under the circumstances shown by the evidence in this case, the defendant is not liable to either of the plaintiffs for the overflow complained of.

The Court refused to give the foregoing instruction, to which refusal defendant excepted, and its exception was duly allowed. [44]

IV.

Defendant's requested instruction No. 4 was given.

V.

If you find from the evidence that any portion of the lands of Mr. Wasson and Mr. Royer was overflowed by water which passed through the defendant's culvert or which passed through the break in defendant's railroad west of the county road, then I instruct you that any flowage or damage arising by the presence of waters from that source upon those lands, the defendant would not be liable.

The Court refused to give the foregoing instruction, to which refusal defendant excepted, and its exception was duly allowed.

Thereupon, the Court instructed the jury as follows:

Instructions of Court to Jury.**GENTLEMEN OF THE JURY:**

To be brief, these two actions are prosecuted by land owners to recover damages for injuries to real and personal property caused, as alleged, by the construction of a railroad embankment by the defendant over and across a natural watercourse, without making adequate provision for the flow of water running in such watercourse, whereby the water was caused to overflow the lands of the plaintiffs, thereby causing injury to the real property of the plaintiffs Wasson and to the real and personal property of the plaintiff Royer.

The law of the case is plain and simple as I view it. Of course, the railroad company had a lawful right to construct its road bed along its right of way, together with the right to make all necessary cuts and fills, but where such roadbed crossed a natural watercourse the company was bound to construct a culvert or make other adequate provision to permit of the passage of the waters flowing down the stream at times of all ordinary freshets, but was not bound to anticipate or provide against [45] unprecedented or unexpected floods.

To the giving of the foregoing instruction defendant excepted, and its exception was duly allowed.

The first question for your consideration, therefore, is, did the company in the present instance make adequate provision for the free passage of all water which might ordinarily be expected to flow through the watercourse in question? If it did not,

and such failure on its part was the direct and proximate cause of the injury to the property of the plaintiffs, real or personal, the plaintiffs are entitled to a verdict at your hands.

To the giving of the foregoing instruction defendant excepted, and its exception was duly allowed.

If, on the other hand, you find from the testimony that the defendant made such adequate provision, or if you find that the Government dam in Mr. Starkey's field across the Spring Creek drain had the effect to cause the surface water to run out of the channel and to overflow a portion of Mr. Starkey's field, and that this overflow water ran directly thereon, crossing the defendant's railroad west of the county road and thence down upon the lands of Mr. Wasson, and thence to the lands of Mr. Royer, and that the flow of this particular portion of those surface waters did not at any time flow down to the railroad embankment where the culvert was located, or wherein water backed up from such culvert as located, your verdict shall be for the defendant. If you find from the evidence that any of the water which passed over the lands of Mr. Wasson and Mr. Royer was in whole or in part due to the direct flow from Mr. Starkey's field, then for any injury caused by such flowage the defendant would not be liable.

If under the instructions I have given you, you find that the company was at fault, the only remaining question will be to assess the amount of damages. The measure of damages is the difference between the fair market value of the real property imme-

diately [46] before and immediately after the act or omission which caused the injury. Testimony has been offered here tending to show the cost of leveling, plowing and reseeded the property, etc., but the sole object of this testimony was to enable you to determine the correct measure of damages—that is, the actual loss sustained by the land owners. That loss, as I have already stated, is the difference between the value of the property before and after the overflow. This rule of damages applies to the real property of both of the plaintiffs. Injury is alleged to certain personal property belonging to the plaintiff Royer. Where the personal property was totally destroyed of course the measure of damages is the fair market value of the property at the time of its destruction, and where the property was only injured the measure of damages is the difference between the fair market value of the property before and immediately after the injury.

With these instructions to guide you, I apprehend you will have little difficulty in agreeing upon a verdict. Much of the testimony offered here has been expert in character. The opinions of witnesses are not binding upon you. You will give to them such weight as you deem them entitled to under all the surrounding circumstances. It is a well-known fact that the expert witness always testifies in favor of the party who calls him. He may be called because he will so testify, or he may so testify because he is called. But whatever the reason, the weight of such testimony is exclusively for your consideration, and depends in a large measure upon the ability or ca-

capacity of the witness to form a correct opinion under the circumstances of the given case, and his candor and truthfulness in expressing that opinion before the jury. Guided by these considerations you will give the opinions of such witnesses such weight as you deem them entitled to.

Testimony has been offered here tending to show the market value of certain thoroughbred hogs for breeding purposes. [47] You understand from experience that the thoroughbred hog has no fixed market value like the common hog of commerce. The price paid for such an animal depends more upon the reputation of the seller and the caprice of the buyer than upon the qualities of the animal itself. Nevertheless you must determine their value where they were destroyed, and you must determine the measure of damages where they were only injured. In fixing the market value you will fix such price as the hogs could be sold for within a reasonable time by a willing seller to a willing purchaser. If you find that the hogs were destroyed or rendered useless for the purposes for which they were kept and held, the measure of damages will be the difference between their fair market value before the injury and what was or could be realized for them after the injury.

You are the sole judges of the facts in this case and of the credibility of the witnesses. Before reaching a verdict you will carefully consider and compare all the testimony. You will observe the demeanor of the witnesses upon the stand; their interest in the result of your verdict, if any such interest is dis-

closed; their knowledge of the facts in relation to which they have testified; their opportunity for hearing, seeing or knowing those facts; the probability of the truth of their testimony; their intelligence or lack of intelligence; their bias or prejudice, and all the facts and circumstances given in evidence or surrounding the witnesses at the trial.

I further charge you that if you find from the testimony that any witness has wilfully testified falsely to a material fact you may disregard the testimony of such witness entirely except insofar as he is corroborated by other credible testimony or by other known facts in the case.

The burden is upon the plaintiffs in these cases to establish their claims by a preponderance of the testimony. A preponderance of the testimony does not necessarily mean the [48] greater number of witnesses because you may believe one witness in preference to many if convinced of the truthfulness of his testimony. The weight of testimony depends upon circumstances, such as the demeanor of the witnesses upon the stand; their interest; their intelligence, and other facts and circumstances which go to convince the human mind and enable the jury to say that the probabilities tend in one direction rather than in another.

Plaintiffs' Exhibits "A" and "B" and Defendant's Exhibits Nos. 1 and 2 are hereto physically attached and made a part of this Bill of Exceptions.

After the exceptions above noted were taken and allowed, the jury retired to deliberate upon their verdict, and afterwards returned into court and re-

ported their verdict, and the same was received and filed and judgment entered thereon; and now, because the foregoing matters and things are not of record in this case, I, F. H. Rudkin, District Judge and the Judge who tried the above-entitled action in the District Court of the United States for the Eastern District of Washington, Southern Division, do hereby certify that the foregoing bill of exceptions truly states the proceedings had before me on the trial of the above-entitled action, and contains all of the evidence, both oral and written, introduced by either of said parties in said trial, and all of the instructions of the Court on the questions of law presented, and that the exceptions taken by the defendant therein were duly taken and allowed, and that said bill of exceptions was duly prepared and submitted within the time allowed by the rules and order of the court, and is now signed and settled as and for the Bill of Exceptions in the above-entitled action, and the same is ordered to be made a part of the record thereof.

(Signed) FRANK H. RUDKIN,
Judge. [49]

District of Oregon.

I hereby certify that I served the within Bill of Exceptions upon Mr. Lon Boyle, by mailing a copy thereof to him in the following manner. A certified copy of said Bill of Exceptions was duly enveloped, envelope plainly and legally addressed to Mr. Lon Boyle, Prosser, Washington, and with postage prepaid the envelope was deposited in the United States Postoffice at Portland, Oregon.

Dated this 16th day of July, 1918.

(Signed) C. E. COCHRAN,
One of the Attorneys for Defendant.

[Endorsements]: Bill of Exceptions. Filed in the U. S. District Court, Eastern Dist. of Washington. Aug. 6, 1918. Wm. H. Hare, Clerk. By C. Roy King, Deputy. [50]

*In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.*

No. 641.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

PRESTON ROYER,

Defendant in Error.

Assignment of Error.

Comes now the plaintiff in error above named, appearing by A. C. Spencer and C. E. Cochran, its attorneys of record, and says that the judgment and final order of this Court, made and entered in the above-entitled court on the 9th day of May, 1918, in favor of the defendant in error and against plaintiff in error, is erroneous and against the just rights of this plaintiff in error and files herein together with its petition for writ of error from said judgment and order, the following assignments of error, which it avers occurred upon the trial of said cause:

I.

The Court erred in refusing to give to the jury the following instruction requested by plaintiff in error:

Gentlemen of the Jury, under the view the Court takes of the law in this case, your verdict should be in favor of the defendant, and I therefore instruct you to that effect.

II.

The Court erred in declining to give to the Jury the following instruction requested by the defendant-plaintiff in error:

I instruct you that defendant had a right to build its railroad embankment at the place and in the manner which the evidence shows the same was built. [51]

III.

The Court erred in refusing to give to the Jury the following instruction:

I instruct you that under the evidence in this case the so-called channel of Spring Creek was nothing more than a drain for surface water resulting from melting snow in the drainage area above the lands in question and that other than from such melting snow the channel of Spring Creek carries no water and is dry for eleven months out of the year. This surface water is a common enemy against the flowage of which every land owner must defend himself, and I instruct you that the defendant in this case did nothing in respect to such surface water other than what it had a right to do in respect to its own property and in building its own rail-

road embankment. It had a right to place its embankment across Spring Creek drain, leaving whatever opening its engineers decided upon, and that under the circumstances shown by the evidence in this case, the defendant is not liable to either of the plaintiffs for the overflow complained of.

IV.

The Court erred in refusing to give to the jury the following instruction requested by defendant-plaintiff in error:

If you find from the evidence that any portion of the lands of Mr. Wasson and Mr. Royer was overflowed by water which passed through the defendant's culvert or which passed through the break of defendant's railroad west of the county road, then I instruct you that any flowage or damage arising by the presence of waters from that source upon those lands, the defendant would not be liable.

V.

The Court erred in giving to the jury the following instruction:

The law of the case is plain and simple as I view it. Of course, the railroad company had a lawful right to construct its roadbed along its right of way, together with the right to make all necessary cuts and fills, but where such roadbed crossed a natural watercourse the company was bound to construct a culvert or make other adequate provision to permit the passage of the waters flowing down the stream at times of all

ordinary freshets, but was not bound to anticipate or provide against unprecedented or unexpected floods.

And also the following instruction :

The first question for your consideration, therefore, is, did the company in the present instance make adequate provision for the free passage of all water which might ordinarily be expected to flow through the watercourse in question? If it did not, and such failure on its part [52] was the direct and proximate cause of the injury to the property of the plaintiffs, real and personal, the plaintiffs are entitled to a verdict at your hands.

VI.

The Court erred in entering judgment in favor of the defendant in error and against the plaintiff in error for the sum of Eight Hundred Fifty (\$850.00) Dollars, together with the costs and disbursements of the action, and in not dismissing said complaint, and in refusing and declining to enter judgment in favor of the plaintiff in error.

WHEREFORE, the plaintiff in error and defendant in the judgment, prays that said judgment of the District Court be reversed with directions to the District Court to enter a judgment in favor of the defendant, plaintiff in error herein.

(Signed) A. C. SPENCER,

C. E. COCHRAN,

Attorneys for Plaintiff in Error.

[Endorsements]: Assignment of Error. Filed in the U. S. District Court, Eastern Dist. of Washing-

ton. Aug. 6, 1918. Wm. H. Hare, Clerk. By C. Roy King, Deputy. [53]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 641.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

PRESTON ROYER,

Defendant in Error.

Petition for Writ of Error.

Oregon-Washington Railroad & Navigation Company, a corporation, conceiving itself aggrieved by the final order of this Court, made and entered against it and in favor of the defendant in error, on the 9th day of May, 1918, and in respect to the rulings and instructions in said cause made, as set forth in its assignments of error filed herein, petitions said Court for an order allowing said plaintiff in error to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignments of error filed herewith, and also that an order be made fixing the amount of security which the plaintiff in error shall give upon said writ, and that upon giving such security all further proceedings in this court be suspended and stayed until the disposal of said

writ of error by the United States Circuit Court of Appeals, and relative thereto plaintiff in error respectfully shows:

That by reason of the premises, plaintiff in error alleges manifest error has happened, to the damage of the Oregon-Washington Railroad & Navigation Company, defendant in said cause. [54]

That plaintiff in error has filed herewith its assignments of error upon which it relies, and will urge in the said above-entitled court.

WHEREFORE, plaintiff in error prays that a writ of error may issue out of the United States Circuit Court of Appeals for the Ninth Circuit to this court for the correction of the errors so complained of, and that a transcript of the record of proceedings, papers and all things concerning the same, upon said judgment so made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, to the end that said judgment be reversed and that plaintiff in error recover judgment as demanded in its answer.

(Signed) A. C. SPENCER.

C. E. COCHRAN.

[Endorsements]: Petition for Writ of Error. Filed in the U. S. District Court, Eastern Dist. of Washington. Aug. 6, 1918. Wm. H. Hare, Clerk. By C. Roy King, Deputy. [55]

*In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.*

No. 641.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

PRESTON ROYER,
Defendant in Error,

Order Allowing Writ of Error.

On consideration of the petition for writ of error and assignments of error attached thereto, the court does hereby allow the writ of error to the plaintiff in error, Oregon-Washington Railroad & Navigation Company, upon giving bond according to law in the sum of Two Thousand (\$2,000.00) Dollars, which shall operate as a supersedeas bond.

Dated this 30 day of July, 1918.

(Signed) FRANK H. RUDKIN,
United States District Judge, for the Eastern Dis-
trict of Washington, Southern Division, who
tried said cause and entered said judgment.

[Endorsements]: Order Allowing Writ of Error.
Filed in the U. S. District Court, Eastern Dist. of
Washington, Aug. 6, 1918. Wm. H. Hare, Clerk.
By C. Roy King, Deputy. [56]

*In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.*

No. 641.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

PRESTON ROYER,

Defendant in Error.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS,
that Oregon-Washington Railroad & Navigation
Company, a corporation, principal, and National
Surety Company of New York, a corporation,
surety, are held and firmly bound unto Preston
Royer, the above-named defendant in error, in the
sum of Two Thousand (\$2,000) Dollars, to be paid
to the said defendant in error, for which payment,
well and truly to be made, we bind ourselves and
each of us, jointly and severally, and our and each
of our successors and assigns, firmly by these pre-
sents.

Sealed with our seals this 30th day of July, 1918.

WHEREAS, the above-named plaintiff in error
is prosecuting a writ of error to the United States
Circuit Court of Appeals for the Ninth Circuit to
reverse the judgment in the above-entitled cause
by the District Court of the United States for the

Eastern District of Washington, Southern Division,
entered on the 9th day of May, 1918,

NOW, THE CONDITION of this obligation is such that if the above-named Oregon-Washington Railroad & Navigation Company shall prosecute said writ of error to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation [57] to be void; otherwise to be and remain in full force and effect.

(Signed)

OREGON-WASHINGTON RAILROAD &
NAVIGATION COMPANY,

By A. C. SPENCER,
Assistant Secretary.

(Signed)

NATIONAL SURETY COMPANY OF
NEW YORK,

By LESTER P. EDGE,
Resident Vice-President.

Attest:

(Signed) T. L. JONES,
Resident Assistant Secretary.

The foregoing bond is hereby approved this 5th day of Aug., 1918, and the same, when filed, shall operate as bond for costs on appeal, and as a superseas bond.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Bond. Filed in the U. S. District Court, Eastern Dist. of Washington, Aug. 6, 1918. Wm. H. Hare, Clerk. By C. Roy King, Deputy. [58]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 641.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

PRESTON ROYER,

Defendant in Error.

Writ of Error.

United States of America,
Ninth Judicial District,—ss.

The President of the United States, to the Honorable The Judge of the District Court of the United States for the Eastern District of Washington, Southern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of the plea which is in the said District Court before you, between Oregon-Washington Railroad & Navigation Company, plaintiff in error, and Preston Royer, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, the Oregon-Washington Railroad & Navigation Company, a corporation, as by its complaint appears, we, being willing that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command

you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, within [59] thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held; that the record and proceedings aforesaid, being then and there inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error that of right, and according to the laws and customs of the United States of America, should be done.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 31 day of July, 1918.

[Seal] (Signed) W. H. HARE,
Clerk of the District Court of the United States, for
the Eastern District of Washington, Southern
Division.

Allowed by

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Writ of Error. Filed in the U. S. District Court, Eastern Dist. of Washington, Aug. 6, 1918. Wm. M. Hare, Clerk. By C. Roy King, Deputy. [60]

*In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.*

No. 641.

OREGON-WASHINGTON RAILROAD & NAVI-
GATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

PRESTON ROYER,

Defendant in Error.

Citation on Writ of Error.

To Preston Royer and Messrs. Hayden, Langhorne
& Metzger and Lon Boyle, Your Attorneys,
GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, within thirty days from the date hereof, pursuant to writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Washington, Southern Division, wherein Oregon-Washington Railroad & Navigation Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

Given under my hand at Spokane in said district,
this 31 day of July, 1918.

(Signed) FRANK H. RUDKIN,

Judge.

Service of the within citation accepted, this 19 day of August, 1918.

(Signed) LON BOYLE and
HAYDEN, LANGHORNE & METZGER,
Attorneys for Defendant in Error.

[Endorsements]: Citation on Writ of Error. Filed in the U. S. District Court, Eastern Dist. of Washington, Aug. 6, 1918. Wm. H. Hare, Clerk. By C. Roy King, Deputy. [61]

In the District Court of the United States for the Eastern District of Washington, Southern Division.

No. 641.

OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a Corporation,
Plaintiff in Error,

vs.

PRESTON ROYER,
Defendant in Error.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will please prepare transcript of the complete record in the above-entitled case, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial Circuit, under the writ of error to be perfected to said Court, and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

1. Complaint,
 2. Answer,
 - 2-A. Reply,
 - 2-B. Verdict,
 3. Judgment,
 4. Bill of Exceptions and Certificate,
 5. Assignments of Error,
 6. Petition for Write of Error,
 7. Order Allowing Writ of Error and Fixing Bond,
 8. Supersedeas Bond and Bond for Costs,
 9. Citation,
 10. Writ of Error,
 11. Praeceptum for Transcript of Record,
- and any and all records, entries, pleadings, proceedings, papers and files necessary or proper to make a complete record upon said writ of error in said cause.

Said transcript to be prepared as required by law, and the rules of this Court and the rules of the United States Circuit Court of Appeals for the Ninth Judicial District.

(Signed) A. C. SPENCER,
C. E. COCHRAN,

Attorneys for Plaintiff in Error. [62]

Address of Attorneys:

510 Wells Fargo Building,
Portland, Oregon.

[Endorsements]: Praeceptum for Transcript. Filed in the U. S. District Court, Eastern Dist. of Washington. August 12th, 1918. W. H. Hare, Clerk. [63]

*In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision.*

No. 641.

PRESTON ROYER,

Plaintiff,

vs.

OREGON-WASHINGTON RAILROAD AND
NAVIGATION COMPANY.

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, W. H. Hare, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages constitute and are a full, true, correct and complete copy of so much of the record, pleadings, orders and other proceedings had in said action, as the same remains of record and on file in the office of the Clerk of said District Court, as called for by the defendant and plaintiff in error in its praecipe, and that the same constitutes the record on writ of error from the judgment of the District Court of the United States in and for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, San Francisco, California, which writ of error was lodged and filed in my office on August 6th, 1918.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause,

I further certify that the cost of preparing, certifying and forwarding said record amounts to the sum of (26.45) twenty-six and 45/100 dollars, and that the same has been paid in full by A. C. Spencer and C. E. Cochran, Attorneys for the Defendant and Plaintiff in Error,

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said District Court, at Spokane, in said District, this 23d day of August, A. D. 1918.

[Seal]

W. H. HARE,
Clerk. [64]

[Endorsed]: No. 3203. United States Circuit Court of Appeals for the Ninth Circuit. Oregon-Washington Railroad & Navigation Company, a Corporation, Plaintiff in Error, vs. Preston Royer, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Southern Division.

Filed August 26, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

